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No. 90-554

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

JACK R. THOMAS,

Petitioner,

vs.

THE GARRETT CORPORATION,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RESPONSE BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED FOR REVIEW

Should certiorari be granted where the arguments advanced in the petition were not raised or considered in the courts below, the decisions below were based solely on state contract law, and there is no conflict among the circuits as to the issues raised in the petition.

**LIST OF ALL PARTIES TO THE PROCEEDING IN
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

The parties appearing in the caption of this case were the only parties to the proceedings in the court of appeals. Allied-Signal, Inc. is the corporate successor in interest to Garrett Corporation. Pursuant to Supreme Court Rule 29.1, the following comprises the current list of all subsidiaries (except wholly-owned subsidiaries) of Allied-Signal, Inc.:

Allied-Apical Company (Partnership)
 Allied-General Nuclear Services (Partnership)
 ACE, Limited
 ACE Cayman Islands Limited
 Allied Automotive Ltda.
 Allied-Signal Ltd.
 Bendix Systemes Vehicules Industriels S.A.
 Bendix Europe, S.A.
 Amoricaine de Fonderia Le Chatelet, S.A.
 Bendix Deutschland GmbH
 Bendix Espana, S.A.
 Bendix Europe Aftermarket S.A.
 Bendix Europe Services Techniques S.A.
 Bendix France, S.A.
 Societe Civile Immobiliere Prieur & Cie
 Bendix Italia S.p.A.
 Bendix Altechna
 Bendix Ricambi, S.p.A.
 Cierock Ricambi, S.p.L.
 Bendix Portuguesa Sociedade de Equipamentos
 Automoveis, Limitada
 D.B.A. S.I.B.E., SNC
 France Automobile Service, S.A.
 Lucas Air Equipment S.A.
 Sifra Industries, S.A.
 TENSA, S.A.
 Transpar Iberica, S.A.
 Bendix Mexicana, S.A. de C.V.
 Endevco Corporation

Ferranti plc
 Fram Italiana S.p.A.
 FIAAM Filter, S.p.A.
 Garrett GmbH
 Garrett Productos Automotrices S.A.
 Jurid Werke, GmbH
 Asia Pacific Resin Corporation
 Doosan Electro Materials Co., Ltd.
 Financiere Allied-Signal, S.A.
 Nittobo-Norplex/Oak Inc.
 Norplex Oak India Limited
 Oak/Mitsui Inc.
 Sistemas Bendix de Seguridad S.A. de C.V.
 Seo Han-Bendix Company Limited
 Kalyani Brakes Limited
 Bendix Electronic Service Corporation de Espana, S.A. (I)
 Bendix Jidosha Kiki Corporation
 Bendix Mintex Proprietary Limited
 Bendix Group Super Annuation Pty., Ltd.
 Bunker Ramo Electronic Data Systems, S.A.
 Chico Corporation
 Coalition Remedial Efforts, Inc.
 Compania Industrial de Fluorita, S.A.
 Compania Metalurgica de Parral, S.A.
 UOP Inter-Americana, Inc.
 Nikki-Universal Co., Ltd.
 Union Shows K.K.
 UOP Management Services (Saudi Arabia) Limited
 Shanghai UOP-UCC Molecular Sieve Co., Ltd.
 Garrett Comptronics Licensing Corp.
 Globe Auto Electricals, Ltd. (I)
 Hankuk Brake Industrial Co., Ltd.
 International Robomation Intelligence Inc.
 International Technigroup Inc.
 Industrial Turbines International Inc.
 International Turbine Engine Corporation (I)
 Japan Gasoline Co., Inc.
 Jidosha Kiki Co., Ltd.
 JSR Allied Corporation
 Leaseway All-Services, Inc.

Lucky Allied Plastics Corporation
Manbriitt Industries, Inc. (N)
Nippon Amorphous Metals Co., Ltd.
Nirlon Synthetic Fibres and Chemicals, Ltd.
Nitto Boseki Company Ltd.
Normalair Garrett (Holdings) Ltd.
Normalair Garrett Ltd.
Dynamic Turbocharger Services Pty., Ltd. Queensland
Dynamic Turbocharger Services Pty., Ltd. Victoria
Prestolite of India Ltd. (I)
Quimobasicos, S.A.
Propelentes Mexicanos, S.A. Societe d' Etudes et de
Constructions Aero-Navales [SECAN]
Sofratype, S.A.
Synektron Corporation
Turbodina S.A.I.C.
Union Texas Exploration Corporation
Union Texas International Corporation
Union Texas Petroleum Holdings, Inc.
USHA Amorphous Metals Ltd.

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OPINIONS BELOW

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit is unreported. [Pet. App. at 1-1.] The order of the district court was not officially reported, but has been published at 5 Indiv. Emp. Rights Cases (BNA) 847 (D. Ariz. 1989).

JURISDICTION

Petitioner purportedly invokes the jurisdiction of this Court pursuant to "18 U.S.C. §1254(1)." [Pet. at 1.] No such statute exists. The jurisdiction of the district court and the court of appeals was based upon diversity of citizenship of the parties, pursuant to 28 U.S.C. §1332.

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OCTOBER TERM, 1990

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ON PETITION FOR A WRIT OF CERTIORARI TO
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RESPONSE BRIEF IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

This case arises from the eleven-month layoff of petitioner Jack Thomas from his employment with respondent The Garrett Corporation. Thomas was laid off in August, 1987 as part of a company-wide workforce reduction, and was recalled to employment in July, 1988. In the interim, he filed suit against Garrett claiming that certain co-workers should have been laid off before he was.¹ He alleged that

¹ Thomas' complaint was filed in the Arizona Superior Court, and was thereafter removed by respondent to federal court on the grounds of diversity of citizenship, pursuant to 28 U.S.C. §1441.

this constituted a breach of his purported employment contract, as embodied in Garrett's employee handbook. No collective bargaining agreement or federal labor issue is present in this case. Thomas is still employed by Garrett.

The district court granted summary judgment in favor of Garrett on two alternative grounds. The court ruled that Thomas' employment was terminable at will, and that he could be discharged at any time. [Pet. App. at 2-2.] The court's decision was based, in part, upon multiple written acknowledgments by Thomas during his employment that he was employed on an at-will basis, and upon admissions by Thomas during the litigation that he understood that he was an at-will employee. Prior to Thomas' layoff, he had twice signed written acknowledgements that his employment could be terminated without cause at any time, at the option of either Garrett or himself. Each time, he carefully read the acknowledgements and understood them to mean that his employment was terminable at will.

Garrett's employee handbook stated that it was not a contract of employment and that employment with the company was terminable at will. Thomas carefully reviewed these handbook provisions at the commencement of his employment, he understood them to govern his employment relationship with Garrett, and he recognized that the handbook was not a contract. Based upon the foregoing, the district court ruled that Thomas could not prove a breach of contract under Arizona law.

The district court also ruled, as an alternative ground for its decision, that even if the employee handbook had constituted a binding contract of employment, that Thomas was required to exhaust the grievance procedures set forth in the handbook prior to filing a legal action.² [Pet. App. at

² Garrett's employee handbook contains a multi-step grievance procedure that culminates in the joint appointment of an outside arbitrator whose decision is binding upon the company and the employee.

2-10.] This ruling was based on the traditional rule, as adopted in Arizona, that an employee must first exhaust contractual remedies before bringing suit. [*Id.*] Thomas contended that he had not invoked the grievance procedure because his layoff was not within the scope of the matters subject to the grievance policy. [*Ibid.*]

The court of appeals affirmed the district court's decision. The appellate panel ruled that under Arizona law an employer could preserve the at-will employment relationship by making a disclaimer in an employment handbook or other materials, just as Garrett had done. The court stated that Thomas' appeal was based solely upon Arizona law, that his underlying claim was based upon Arizona law, and that the court was bound by the law of Arizona in resolving the appeal. [Pet. App. at 1-2.] The court of appeals did not address any issue of federal law.

The ruling of the court of appeals that Thomas' employment was terminable at-will was dispositive of his breach of contract claim. Accordingly, the appellate court did not reach the exhaustion of remedies issue, which the district court had cited as an alternative ground for its decision.

ARGUMENT

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

1. The issues set forth in the petition were not raised or addressed in the courts below.

2. No question of federal law is at issue; this case was resolved solely on state law grounds. The decision of the court of appeals does not conflict with any decision of this Court or any federal court of appeals. At most, the case involves a single employee's challenge to a term of his alleged employment contract.

**I. THE PETITION SHOULD NOT BE
CONSIDERED BECAUSE THE ISSUES
RAISED THEREIN WERE NOT ASSERTED
BELOW.**

None of the issues asserted in the petition were raised in the district court. The only legal claim asserted in Thomas' complaint was for "breach of employment contract" under Arizona law. [Resp. App. A.] No federal claims were asserted by Thomas at any stage in the district court proceedings. Likewise, the arguments raised by Thomas in opposition to summary judgment were based solely upon state law contract theories. [Pet. App. at 2-4 to 2-7.] The decision of the district court addressed only those contract claims.

Petitioner advanced his "Constitutional" claims for the first time in the court of appeals. However, those arguments were not addressed by the court of appeals, which affirmed the district court's decision based only upon the state contract law issues asserted by Thomas. Under the circumstances, the arguments asserted in the petition should not be considered by the Court. *Tennessee v. Dunlap*, 426 U.S. 312, 314 n.2 (1976) (Constitutional argument that was not alleged in complaint or considered by district court or court of appeals was not properly before the Court).

**II. THE PETITION FAILS TO ADVANCE ANY
ISSUES JUSTIFYING ISSUANCE OF A WRIT.**

**A. There Is No Federal Question; The Decision
Below Was Resolved On State Law Grounds.**

Both the district court and court of appeals resolved the case solely on the basis of Arizona state law. Both courts ruled that under applicable state contract law, the layoff of Thomas did not give rise to a claim for breach of employment contract. No issue of federal law was raised or addressed by either court. *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967)

("We do not ordinarily review the holding of a court of appeals on a matter of state law")

Thomas' petition asserts that the First Amendment to the United States Constitution required Garrett to advise employees that they would allegedly be waiving Constitutional rights by consenting to an "at-will" term of employment. [Pet. at 5.] Even if this far-fetched argument were cognizable, it would not support a grant of certiorari. The First Amendment, which by its terms is applicable to governmental actions, does not apply to private employment relationships. *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976). This Court has ruled that the requisite "state action" is not present in actions by private parties. *Central Hardware Co. v. N.L.R.B.*, 407 U.S. 539, 547 (1972).

Thomas also invokes the Fourteenth Amendment in support of this argument, but it too has no applicability in this case. The Fourteenth Amendment, which applies to the actions of a state, does not extend to either the federal government, including the federal courts, or to private employers, such as Garrett. *United Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) (state action under Fourteenth Amendment is not present in private employer's affirmative action plan); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (Fourteenth Amendment does not offer a shield against private conduct, "however discriminatory or wrongful."); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (Fourteenth Amendment applies only to the states, not to the federal government).

Petitioner's "Constitutional" argument appears to be an attack on the summary judgment procedure authorized by Rule 56, Fed. R. Civ. P. In the court of appeals, petitioner was more explicit, claiming that the district court's entry of summary judgment deprived him of a jury trial and was thus unconstitutional. However, the decisions of this Court provide that the summary judgment proceedings are a well-established, appropriate and Constitutional means of adjudication. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)

("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules. . . ."); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944) (summary judgment does not deprive litigant of right to jury trial).

B. There Is No Conflict Among The Courts Of Appeal.

Thomas offers the decision in *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986), as the only circuit court opinion that is contrary to the ruling of the court of appeals. In fact, the *Reid* case is consistent in all respects with the decisions of the court of appeals and the district court. The court in *Reid*, applying Michigan law,³ granted summary judgment in favor of the employer, ruling that the plaintiff's claim for wrongful discharge was precluded by an "at-will" provision in the employment application. 790 F.2d at 462. The employment application at issue in *Reid* was virtually identical to the application executed by Thomas in his employment with Garrett. [Pet. App. at 2-8.] In fact, the district court, which cited *Reid* as support for its decision, noted that there was unanimity among the federal courts construing and enforcing such provisions. [*Id.*, 2-8 to 2-9.] See *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923) (where circuit court opinions "were really in harmony and not in conflict . . . there was no ground for our allowing the writ of certiorari to add to an already burdened docket.").

³ Even if the *Reid* case conflicted with the decision of the court of appeals, it would not be grounds for granting certiorari because the case was based on Michigan law, rather than Arizona law. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) (conflict among circuits interpreting laws of different states is not of itself grounds for granting writ of certiorari).

C. Thomas' Grievance Procedure Argument Is Meritless And Irrelevant.

Thomas contends that a letter, not part of the record, which he only recently revealed suggests that he did invoke the grievance procedure under his alleged employment "contract." [Pet. at 6-8.] Thomas raised this argument for the first time following Garrett's submission of its answering brief in the court of appeals. Prior to that time, Thomas had insisted that the grievance procedure did not apply to him. The court of appeals properly ignored this untimely and contradictory argument.

Thomas never produced the letter in response to Garrett's discovery requests in the district court, nor did he reference the letter in briefing or argument on the summary judgment motion before the district court. Instead, his legal argument to the district court was that he did not invoke the grievance procedure because it did not apply to his lay-off. [Pet. App. at 2-10.] Thomas may not now advance evidence which he apparently possessed but failed to produce in the proceedings below. *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970).

In any event, Thomas' alleged invocation of the grievance procedure is irrelevant for purposes of this Court's review of the decision of the court of appeals. The appellate court ruled that the at-will nature of Thomas' employment, by itself, precluded his breach of contract claim. [Pet. App. at 1-3 to 1-4.] The court of appeals did not address, nor was its decision based upon, the exhaustion of remedies issue. This Court does not grant certiorari to review factual disputes between the parties, particularly where, as here, it was irrelevant to the disposition of the case. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

III. THOMAS' FRIVOLOUS PETITION JUSTIFIES AN AWARD OF DAMAGES TO GARRETT.

The frivolous nature of Thomas' petition is epitomized by the final argument raised in his brief. Thomas contends that the alleged failure by one of his attorneys to file "his formal appearance" in the district court violated various Constitutional provisions. [Pet. at 12.] In truth, Thomas was represented by three separate attorneys throughout the course of the district court proceedings. At the time of the summary judgment proceedings, Thomas was represented by two attorneys, Donald E. Wolfram, Esq. and Seymour Gruber, Esq., both of the firm Donald E. Wolfram Law Office, in Phoenix, Arizona. Both attorneys prepared summary judgment briefs on behalf of Thomas, and Mr. Gruber presented oral argument before the district court on Garrett's summary judgment motion. Mr. Gruber's failure, if any, to file "his formal appearance" did not affect Thomas, his lawsuit or the decisions of the courts below.

Thomas, who is still a full-time employee of Garrett, has pursued this frivolous litigation since his temporary layoff in 1987. Thomas conceded at the early stages of this litigation that his employment was terminable at will. Nevertheless, he has continued to pursue his groundless claims after repeated rejections by the lower courts. In this Court, he now attempts to transform his modest and unfounded state-law contract claim into a Constitutional matter through misapplication and distortion of Constitutional principles. Under the circumstances, Garrett requests that Thomas be required to reimburse it for all legal costs and fees associated with this proceeding, pursuant to Supreme Court Rule 42.2.

CONCLUSION

For the foregoing reasons, this Court should decline to review this case by a writ of certiorari and should award Garrett damages against Thomas.

RESPECTFULLY SUBMITTED this 24th day of
October, 1990.

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APPENDIX A

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IN THE
SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

JACK R. THOMAS,)	
)	
Plaintiff,)	No. CV 88-01834
)	
vs.)	
)	
THE GARRETT CORPORATION, a)	CIVIL
California corporation, dba)	COMPLAINT
GARRETT TURBINE ENGINE)	
COMPANY,)	
)	
Defendant.)	
_____)	

The Plaintiff, by and through his attorney, alleges for his Complaint:

I

Plaintiff is a resident of Maricopa County, Arizona. Defendant is a California corporation authorized to do business and doing business in Maricopa County, Arizona under the name Garrett Turbine Engine Company. All acts as alleged herein occurred in Maricopa County, Arizona, except as otherwise specified.

II

On or about September 6, 1985, Plaintiff was employed by Defendant. Plaintiff's contract of employment included the provisions contained in the statements of policy and procedure promulgated from time to time by Defendant corporation, and in particular included the policies referred to herein regarding layoff of full time employees.

III

The policies of the Defendant included a policy which provided that, in the event layoff of employees was necessary, layoffs would be conducted on a departmentwide basis, with less senior people being laid off before those with greater seniority.

IV

On or about August 26, 1987, Plaintiff was laid off from his position as a materials handler. He had been recommended for a promotion to the position of dispatcher, which is a higher level position than that of materials handler. The action on this recommendation was delayed, and Plaintiff was never given the recommended promotion prior to being laid off.

V

At the time of Plaintiff's layoff, there were several materials handlers within his department who had less seniority than he did and who were working at the same grade level in essentially the same job as Plaintiff.

VI

The manner in which the Defendant chose to lay off the Plaintiff while retaining those with less seniority in his department was a direct violation of the Plaintiff's contract

of employment, because it contradicted the stated policies and procedures of the Defendant in existence at the time of the layoffs.

VII

As a proximate consequence of Defendant's actions as set forth herein, Plaintiff suffered and continues to suffer damages including loss of earnings and benefits, deprivation of seniority and the job security that attaches to it, the loss of future earnings and benefits and other damages which shall be set forth more fully at the time of trial.

VIII

This case arises out of a contract, entitling Plaintiff to an award of his reasonable attorney's fees incurred in bringing this action as authorized by A.R.S. Sec. 12-341.01.

WHEREFORE, Plaintiff prays as follows:

1. For an award of such damages as shall be proven at trial to have been suffered as a result of Defendant's breach of employment contract;
2. For an award of Plaintiff's costs incurred in bringing this action, including reasonable attorney's fees;
3. For such other and further relief as the Court deems just and proper.

DATED: December 11, 1987.

/s/ _____
FRANCIS G. FANNING
Attorney for Plaintiff

I, JACK R. THOMAS, being duly sworn, upon oath
depose and say:

1. I am the Plaintiff in this cause of action;
2. I have read the foregoing Civil Complaint and declare the contents therein to be true and correct to the best of my knowledge, information and belief.

SUBSCRIBED AND SWORN to before me this 11th day of December, 1987 by Jack R. Thomas.

My Commission Expires:
November 8, 1990

